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SUBJECT: SOMALIA PIRACY: DEMARCHE INSTRUCTIONS FOR UK AND FRENCH GOVERNMENTS

¶1. This is an action cable see paragraph 2.

¶2. Posts are requested to demarche host governments at the appropriate level to relay USG concerns about French and British edits to the draft UN Security Council resolution (UNSCR) on Somalia piracy. Post may draw from the background in paras 4 and 5 and the USG positions in paras 6-11 to achieve objectives in para 3.

OBJECTIVES

¶3. Our objectives are to try to get the British and French to agree to the following four aspects of our UNSCR on Somalia piracy:

-- retention of the original paragraphs related to the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation;

-- retention of Operative Paragraph (OP) 9 and OP 10 providing greater authorities to combat Somali piracy;

-- retention of language commending AMISOM, welcoming recently brokered agreements, and OP15bis if the UN fails to deliver a concept of operations for a UN Peacekeeping Operations, as was called for in the Security Council Presidential Statement of September 4;

-- retention of language calling for the UN to prepare for a potential takeover of naval escort of World Food Program (WFP) vessels when the European Union EU NAVFOR anti-piracy mission ends;

BACKGROUND

¶4. Over the past year incidents of piracy and armed robbery at sea off the Somali coast have exponentially increased. NATO currently has its Standing NATO Maritime Group 2 (SNMG2) deployed to the area to escort WFP ships and protect commercial vessels from piracy off Somalia's coast. The European Union has just approved a plan for an ESDP mission (EUNAVFOR) to deploy to the area for the next year. The ESDP mission will take over from NATO when it leaves in December. NATO will remain engaged with its NATO Shipping Center and NATO's JFC NAPLES which tracks WFP vessels and will pass Maritime Situational data to the EU Operational HQ in the UK. NATO vessels may take up anti-piracy tasks, if needed, when Standing NATO Maritime Groups deploy to the area of operations. In addition, the Combined Maritime Forces created a Maritime Security Patrol Area in the Gulf of Aden this summer to protect maritime traffic. Finally, several states (such as Russia, India, and Malaysia) have sent their own naval forces to the area to protect merchant vessels from their countries.

15. In December 2007, the United States approached the governments of the UK and France to pitch the idea for a UN Security Council Resolution to combat piracy off the Somali coast. At that time the UK "had the pen" on all issues related to Somalia on the Council. The UK stated they wanted to focus on the situation on the ground and were not prepared to draft a resolution on Somalia piracy. However, they did not oppose the U.S. doing so. During the next few months we worked on our draft resolution with the UK, France, Panama, and several non-Security Council co-sponsors. After a lot of behind the scenes work to alleviate the concerns of Indonesia, Vietnam, and China, the Security Council unanimously passed resolution 1816 on June 2, 2008. UNSCR 1816, among other things, provided to states working with the Transitional Federal Government the authority to enter Somali territorial waters to interdict pirates. In September 2008, the French approached us with their own Security Council resolution on piracy. The French stated the new resolution was needed to give some members of the EU ample top-cover to participate in the proposed ESDP force. They also mentioned this was very important to their President. Even though we effectively retained "the pen" on Somalia piracy, we did not object to the French breaking protocol and tabling their resolution. UNSCR 1838 was passed unanimously on October 7, 2008.

Overview of USG Position

16. The issue of Somalia piracy is of great concern to the United States government, which is why we took the initiative in first drafting UNSCR 1816 in early 2008. While we believe that 1816 was an excellent starting point, we feel the situation off the coast of Somalia has changed so much over the last six months that a simple roll-over of 1816 is no longer sufficient. Specifically, we feel the international community needs to: address the problem of how to effectively prosecute pirates; make sure we have "all necessary means" to interdict pirates inside Somali territorial waters and in the high seas off the coast of Somalia; acknowledge the problem of piracy will never go away until the international community addresses the situation on the ground; and, ensure the long-term security of WFP deliveries to Somalia.

SUA language

17. As we see it, the most pressing problem facing the international community today is the issue of Persons Under Control (PUCs), or in laymen's terms what to do with the pirates once they are captured. Currently, many states may be fearful to do more to interdict pirates because they do not want them detained on their naval vessels for long periods of time (in one instance, for almost 6 months), while they solicit help from the international community to prosecute them. "Catch and release" poses its own problems.

18. The United States notes there are already sufficient legal mechanisms to deal with the problem, specifically the United Nations Convention on the Law of the Sea (UNCLOS) and the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA). It is with this in mind that we have proposed OPs 12 and 13. Taken together these paragraphs call on states to join SUA if they have not already done so (currently there are 150 party states to SUA), encourage states to pass implementing legislation so the conduct associated with piracy can be prosecuted in their countries, and ask states to carry out SUA obligations. The SUA provides for parties to accept the delivery of detained suspects into their countries when so requested by the master of a ship that is flagged by a SUA party. Once in the custody of a party state, this country would be obliged to conduct an immediate inquiry and, if

warranted, extradite the suspected pirates to another SUA party or submit the case to its competent authorities for the purpose of prosecution. Admittedly some states, especially those in the region, do not have the necessary judicial capacity to effectively prosecute suspected pirates, which is why we believe OP14 is equally important.

¶9. From our discussions with the British and French missions in New York, we understand there is some hesitancy to using SUA as a legal mechanism to prosecute pirates. Specifically there were concerns SUA would link the piracy issue to terrorism. While the negotiation of the SUA was certainly motivated by worldwide concern about terrorism, the language of the 1988 Convention explicitly covers all violent offenses against ships, including conduct associated with piracy, not just those with a terrorist motive. In this respect, the 1988 Convention is different from the protocols to SUA adopted in 2005 by the IMO (but not yet in force), which are more expressly addressed to terrorist activity - for example, offenses added by those Conventions include a requirement that the motive behind the offense be to intimidate a population or affect government action. In fact, the Parties to SUA indicated they were concerned about unlawful acts against the safety of maritime navigation, particularly those that "jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine confidence of the people of the world in the safety of maritime navigation." This succinctly captures the conditions produced by the conduct related to Somali piracy today.

¶10. We believe the SUA convention provides a solid framework for addressing piracy issues once pirates have been interdicted. If the conduct by pirates meets the definition of an existing SUA offense (i.e. if, among other things that person unlawfully and intentionally "seizes or exercises control over a ship by force or threat of force or any other form of intimidation or performs any act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship."), then it is quite appropriate to address the case within the ambit of SUA, particularly if the affected State otherwise lacks adequate national law to address such activity or to appropriately cooperate with other states in doing so. SUA may, in many cases, be both applicable and singularly useful in combating the conduct with which this UNSCR is concerned. Further, it is our understanding that the idea of using SUA mechanisms to prosecute pirates was discussed and supported by many States at the IMO Council meeting on November 12.

¶11. The bottom line is that we need to have explicit language addressing prosecution of suspected pirates in this resolution. The dramatic increase in piracy attacks since the last UNSCR is clear evidence that interdiction authority alone is not enough. However, if the UK or France has a better alternative to address the PUC issue in an expeditious manner, we will be happy to consider it. We would be happy to put French and/or UK legal experts on the topic in touch with our lawyers at the Department of State and Department of Defense to work out any concerns on these paragraphs.

New authorization, OP9 and OP10

¶12. While we are very happy with 1816 as a starting point, we feel the situation has developed so much over the last six months that a simple renewal is not sufficient. The authorization in UNSCR 1816 (i.e. paragraph 7) only extends the legal authorities available to combat piracy on the high seas into Somali territorial seas. While this was a good start, this has not proven to be adequate to address the problems for two reasons: 1.) most attacks occur outside territorial seas; and 2.) the current legal authorities available to combat piracy on the high seas are too narrow to encompass certain more aggressive actions needed to deter piracy. Since the adoption of 1816 authorization, there have in fact been more incidents of

piracy off the coast of Somalia. First, the USG proposal in OP 9 and 10 would expand the legal authorities available to combat piracy making clear that "all necessary means" are available to combat piracy both in Somali territorial waters and on the high seas off the coast of Somalia. Second, the USG proposal would also help provide authority in the situation where a suspected pirate vessel is found or flees by permitting the authority to forcibly interdict it.

AMISOM and UN PKO language

¶13. We also hear from the UK and French Missions in New York that they have considerable problems with linking the situation on the ground to the piracy issue. Our preambular paragraph (PP) 12 is not controversial and taken from previous resolutions on Somalia. While PP 13 is new language, the signing of the Djibouti Agreement and the Joint Cease Fire Agreement are very significant developments in Somalia that deserves the Council's recognition and praise. We also assume the Secretary-General's report due November 15 will have issues that should be addressed, which is why we recommend keeping PP 14. OP15bis is an if needed paragraph following up on the September 4 PRST, which asked for a concept of operations for a UN Peacekeeping Operation. If the Secretariat provides a conop for a UN PKO as requested, we will not need to introduce OP15, which is why it is in brackets.

WFP Planning

¶14. We would also ask for the retention of PP 10 and OP 6. We in no way want to insinuate that the EU will not fulfill its commitments to escorting the WFP vessels, as was relayed to us by the French mission in New York. We very much appreciate France's leadership on this issue. We fully expect the EU will successfully complete its 12 month mission and may possibly continue the program longer than that. However, we want to be ready for the possibility that one day the EU mission will end and the UN may want to take over the operation. Recent experience on this issue, as is being showcased in the transition from EUFOR to MINURCAT, shows that the more planning for this possibility the better. Ensuring the long-term delivery of WFP deliveries to Somalia is a top priority to the U.S. As you may know the United States provides 80% of WFP aid to Somalia.

Deadline and POC

¶15. Post is requested to report back results of this demarche via front channel by 5pm EDT, Monday, November

¶17. For more information contact IO/UNP Joseph FitzGerald at 202-647-2641.

Draft resolution

¶16. Begin text of U.S. draft UNSCR on Somalia Piracy:

(1) The Security Council,

(2) Recalling its previous resolutions and the statements of its President concerning the situation in Somalia, especially resolutions 1814, 1816, 1838, and the President's Statement of September 4, 2008,

(3) Continuing to be gravely concerned by the threat that piracy and armed robbery at sea against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of seafarers, commercial maritime routes and to international navigation,

(4) Reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia,

(5) Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities,

(6) Taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government ("TFG") to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial sea,

(7) Taking note of the many public requests from the TFG for international assistance to counter piracy off its coasts, including the letter from the Permanent Representative of the Somali Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG to the Security Council for urgent assistance in securing the territorial sea and international waters off the coast of Somalia, and the 1 September 2008 letter from the President of Somalia to the Secretary-General of the United Nations expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG's willingness to consider working with other states and regional organizations to combat piracy and armed robbery at sea off the coast of Somalia,

(8) Further taking note of the letters from the TFG and from other member states to the Security Council to inform the Council of their actions, as requested in paragraphs 7 and 12 of 1816,

(9) Commending the contribution made by some states, alliance of states, and regional organizations, including the North Atlantic Treaty Organization ("NATO") and the European Union ("EU"), to protect World Food Programme ("WFP") vessels off the coast of Somalia, as well as other international or national initiatives taken with a view to implementing resolutions 1814, 1816, and 1838,

(10) Affirming the Council's readiness to authorize the United Nations Political Office in Somalia to assume the responsibility for the long-term security of WFP maritime deliveries to Somalia,

(11) Noting that a peaceful and stable situation within Somalia will be an important factor in addressing the scourge of piracy and armed robbery at sea off the coast of Somalia,

(12) Commending the contribution that the African Union Mission to Somalia has made to a lasting peace and stability in Somalia, recognizing specifically the important contributions of the Governments of Uganda and Burundi to Somalia,

(13) Welcoming the signing of a peace and reconciliation Agreement ("the Djibouti Agreement") between the TFG and the Alliance of the Re-Liberation of Somalia on August 19, 2008, as well as their signing of a joint ceasefire agreement on October 26, 2008, and noting that the Djibouti Agreement calls for the United Nations to authorize and deploy an international stabilization force,

(14) Welcoming/Noting the report by the Secretary-General of November 4, 2008, that outlines a detailed concept of operations for a feasible Multinational Force and/or a UN Peacekeeping Force to deploy to Somalia,

(15) Determining that the incidents of piracy and armed robbery at sea against vessels in the territorial sea of Somalia and the high seas off the coast of Somalia exacerbate

the situation in Somalia, which continues to constitute a threat to international peace and security in the region,

(16) Acting under Chapter VII of the Charter of the United Nations,

¶1. Reiterates that it condemns and deplores all acts of piracy and armed robbery at sea;

¶2. Deplores the payment of ransoms for pirated vessels by the international shipping community;

¶3. Welcomes the efforts of the International Maritime Organization ("IMO") to update its guidance and recommendations to the shipping industry and to governments for preventing and suppressing piracy and armed robbery at sea against ships and to provide this guidance as soon as practicable to all member states and private industry contacts transiting the Gulf of Aden and areas around Somalia coast;

¶4. Calls upon the industry and insurance companies to continue to cooperate with the IMO and ensure that their vessels receive appropriate guidance and training on avoidance, evasion, and defensive techniques to take if under the threat of attack or attack when sailing in the waters off the coast of Somalia;

¶5. Further calls upon States and interested organizations, including the IMO, to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery at sea off the Somali and nearby coastlines;

¶6. Welcomes the decision by NATO and the EU European Security and Defense Policy ("ESDP") mission to counter piracy off the Somalia coast, including by escorting vessels of the WFP, and requests the Department of Political Affairs, in collaboration with the Department of Peacekeeping Operations, to prepare for the possible United Nations administration of the WFP escort missions should NATO and ESDP mission cease escorting WFP vessels;

¶7. Calls upon States and Regional Organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea against ships off the coast of Somalia, in particular by deploying naval vessels and military aircraft, and consistent with this resolution, by seizing and disposing of boats, vessels, arms and other related equipment used in, or capable of being used in, the commission of piracy and armed robbery off the coast of Somalia and by surveillance of safe havens and staging areas ashore;

¶8. Further calls upon States and Regional Organizations to coordinate their efforts to deter acts of piracy and armed robbery at sea in cooperation with each other, the IMO, the international shipping community, flag states, and the TFG;

¶9. Decides that for a period of 12 months from the date of this resolution States and Regional Organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may enter into the territorial seas of Somalia for the purpose of repressing acts of piracy and armed robbery at sea;

¶10. Decides that for a period of 12 months from the date of this resolution States and Regional Organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may use, off the coast of Somalia, all necessary means to repress acts of piracy and armed robbery

at sea;

¶11. Affirms that the authorizations provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law;

¶12. Urges all States, and in particular flag, port, coastal and regional States, and States of the nationality of victims and perpetrators of piracy and armed robbery at sea, that have not already done so to become parties as soon as possible to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("1988 Fixed Platforms Protocol"), the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("2005 SUA Protocol"), and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf ("2005 Fixed Platforms Protocol");

¶13. Urges States party to the SUA Convention to implement their obligations under the SUA Convention, particularly by (a) making the offenses set forth in article 3 of the SUA Convention punishable by appropriate penalties that take into account the grave nature of those offenses, as provided for in article 5 of the SUA Convention; (b) taking such measures as may be necessary to establish their jurisdiction over the offenses set forth in article 3, and to notify the Secretary-General of the IMO when they have done so, as required by article 6; (c) accepting persons delivered to them pursuant to article 8 of the SUA Convention, to extradite alleged offenders or submit such cases to the competent authorities for prosecution as set out in article 10 of the SUA Convention, and to provide the greatest measure of assistance in connection with criminal proceedings brought in respect of offenses set forth in article 3, as required by article 12 of the SUA Convention; (d) providing relevant information in their possession of the commission of offenses set forth in article 3 to those States having established jurisdiction in accordance with article 4, as called for in article 14 of the SUA Convention; and (e) providing to the Secretary-General of the IMO the information described in article 15 of the SUA Convention;

¶14. Calls upon all Member States and relevant organizations to work with State parties to the SUA Convention to build judicial capacity for the successful prosecution of persons suspected of offenses set forth in article 3 of the SUA Convention, if needed, and to assist Member States who need assistance in ratifying, acceding and/or fully implementing the SUA Convention, the 1988 Fixed Platforms Protocol, the 2005 SUA Protocol, and the 2005 Fixed Platforms Protocol;

¶15. Instructs the UN Secretariat, working with the Secretary-General of the IMO, to act as a clearing house to make recommendations as to which States and/or appropriate entities have the authority to prosecute pirates and other criminals of armed robbery at sea under all relevant international law after a successful interdiction by those acting under the authority of this resolution, to work with those States and/or appropriate entities to ensure that all captured pirates and armed robbers at sea are prosecuted for their crimes, and to hold periodic donors' conferences to help regional SUA states develop the needed capacity to prosecute pirates under their SUA obligations;

(15bis. Requests the Secretariat to provide for Council consideration, a concept of operations for a UN peacekeeping

operation, no later than 15 days from the adoption of this resolution. The concept of operations should include a geographic focus on southern and central Somalia, with key Mission activities focused on: 1) supporting implementation of the Djibouti Peace Agreement, including monitoring and verification of any ceasefire and joint security arrangements and liaison with the Joint Security Committee (JSC); 2) providing protection for the Transitional Federal Institutions to help them carry out the functions of government and security for key infrastructure; to facilitate, within capabilities and in its areas of deployment, humanitarian assistance to affected populations by helping to create the necessary security conditions; and 3) protection of UN personnel, facilities, installations, equipment and mission, and ensuring the security and freedom of movement of UN personnel;) (Language to be inserted into the resolution if DPKO does not provide a conops on a PKO as was directed in the PRST of Sept. 4.)

¶16. Requests the Secretary-General to continue to report to the Security Council periodically on the situation in Somalia, the UN efforts in Somalia, and international efforts to combat piracy and armed robbery at sea off the Somalia coast;

¶17. Decides to remain seized of the matter.
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